

1 PATRICIA A. CUTLER, Assistant U.S. Trustee (#50352)
2 STEPHEN L. JOHNSON, Trial Attorney (#145771)
3 EDWARD G. MYRTLE, Trial Attorney (DC#375913)
4 MAGGIE McGEE, Trial Attorney (#142722)
5 U.S. Department of Justice
6 Office of United States Trustee
7 250 Montgomery Street, Suite 1000
8 San Francisco, California 94104
9 Telephone: (415) 705-3333
10 Facsimile: (415) 705-3379

11 Attorneys for United States Trustee
12 Linda Ekstrom Stanley

13
14
15 **UNITED STATES BANKRUPTCY COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17

18 In re
19 PACIFIC GAS AND ELECTRIC
20 COMPANY

Case No. 01-30923
Chapter 11

21 Date: May 30, 2002
22 Time: 1:30 p.m.
23 Courtroom: Hon. Dennis Montali
24 235 Pine Street, San Francisco

25 **UNITED STATES TRUSTEE'S OBJECTION TO MOTION OF DEBTOR**
26 **TO AUTHORIZE THE RETENTION OF EXPERTS WITHOUT**
27 **FURTHER ORDER OF THE COURT**
28

29 Linda Ekstrom Stanley, United States Trustee, respectfully submits this objection to
30 the Motion of Debtor to Authorize the Retention of Experts Without Further Order of the
31 Court (the "Retention Motion"). The Retention Motion cannot be approved because it is
32 improper in form and inconsistent with the Bankruptcy Code.

33 Debtor's Retention Motion is a roundabout effort to avoid having to disclose the
34 names of professionals assisting in debtor's preparations for confirmation. The Bankruptcy

1 Court should not approve the motion for several important reasons. Debtor submitted no
2 evidence in support of the motion. It is impossible to tell what kind of professionals the
3 order would apply to and the nature of the work these professionals would perform. At
4 bottom, an order like the one debtor prays for would give debtor *carte blanche* to employ any
5 kind of professional, whether lawyer, accountant or economics expert, solely at debtor's
6 discretion rather than the Bankruptcy Court's.

7 Debtor argues strenuously the Bankruptcy Court need not approve the
8 employment of debtor's experts because the experts will not be involved in the
9 administration of the estate. The argument seems to say that so long as *debtor's counsel* sees
10 fit to retain an expert and debtor's counsel is employed under § 327(a), no separate
11 employment request is necessary for the expert. This is a novel contention indeed and it
12 must be rejected.

13 First, it assumes (without providing any evidence) the expert is not intimately
14 involved in the administration of the estate. How do we know that is so? Debtor's proposed
15 plan is enormously complex, calling for the disaggregation of a multi-billion dollar public
16 utility. Does debtor's counsel really have the background to make the important decisions
17 that will take this company from its present state to its hoped-for future? One might
18 reasonably expect debtor and its management would have a say in this, but no reference is
19 made to them, presumably because that would take the motion back into the realm of
20 § 327(a) and its requirement of disinterested advice.

21 Second, the motion calls on the court to abdicate its traditional role of
22 overseeing the employment of professionals under 11 U.S.C. § 327(a)-(e). If granted,
23 debtor's counsel, not the Bankruptcy Court, would have the power to determine whether a
24 professional needed a separate employment order or not and that determination would,
25 apparently, be binding on even the Bankruptcy Court. The Bankruptcy Code does not allow
26 for this unprecedented shift in authority. In fact, the Bankruptcy Code repeatedly compels
27 the court to authorize employment. 11 U.S.C. § 327(a) – (e).
28

1 **ARGUMENT**

2 **I. THE RETENTION MOTION MUST BE DENIED BECAUSE IT IS NOT**
3 **SUPPORTED BY ANY EVIDENCE AND VIOLATES B.L.R. 9013-1(d)**

4 The Bankruptcy Local Rules for the Bankruptcy Court of the Northern District of
5 California require motions be supported by facts:

6 (a) Matters Covered by Rule.

7 This rule shall apply to initial moving papers, opposition papers, and reply
8 papers in any motion, application, or objection in any case or adversary
9 proceeding.

10

11 (d) Affidavits or Declarations.

12 (1) *Factual contentions made in support of or in opposition to any motion, application*
13 *or objection should be supported by affidavits or declarations and appropriate*
14 *references to the record.* Extracts from depositions, interrogatory answers,
15 requests for admission and other evidentiary matter must be appropriately
16 authenticated by affidavit or declaration.

17 (2) Affidavits and declarations shall contain only facts, shall conform as far as
18 possible to the requirements of Fed. R. Civ. P. 56(e), and shall avoid
19 conclusions and argument. Any statement made upon information or belief
20 shall specify the basis therefor. Affidavits and declarations not in
21 compliance with this rule may be stricken in whole or in part.

22 (3) Each affidavit or declaration shall be filed as a separate document.

23 B.L.R. 9013-1 (emphasis added).

24 The Retention Motion must fail because no evidence supports it.¹ Debtor offers no
25 evidence of the type of experts it intends to employ (e.g., lawyers, accountants, economics
26 professors or law professors). It offers no evidence of the work these experts will perform.
27 Instead, debtor relies on a single line of *argument* in support of the motion: "Debtor
28 anticipates that upon the advice of its counsel it will need to retain certain experts, primarily

¹ Debtor suggests it may offer evidence in support of the motion after the filing of its initial papers. The motion refers to "any evidence presented at or prior to the hearing on this Motion." If debtor's intention is to delay the presentation of evidence until reply or, later still, until the hearing, the United States Trustee objects.

1 with respect to regulatory, feasibility, and financial issues raised by its plan of
2 reorganization.” Retention Motion 2:7-9.

3 To quote a phrase, the devil is in the details. For example, what is meant by the term
4 “primarily”? By this, does debtor suggest there are other, distinct areas for professional
5 employment? Does debtor intend to employ professionals in other areas of its bankruptcy
6 case pursuant to the order requested here? The very nature of the term “expert” suggests the
7 range of professionals could be quite broad, including lawyers (with regulatory expertise),
8 accountants (with experience modeling financial projections) or economists.

9 Debtor’s Retention Motion is premised on counsel’s argument alone. Absent some
10 evidence of the professional nature of the experts to be employed, it is not possible to
11 conclude the motion is grounded on appropriate facts and it should be denied.

12 **II. DEBTOR HAS NOT PROVEN THE PROPOSED EMPLOYMENT IS**
13 **CONSISTENT WITH THE LIBERAL STANDARD OF *THAT’S***
ENTERTAINMENT AND ITS ILK

14 Debtor claims the “great weight of authority” permits the bankruptcy court to allow
15 professionals to work as “experts” without an application for employment, relying on *In re*
16 *That’s Entertainment Marketing Group, Inc.*, 168 B.R. 226 (N.D. Cal. 1994). Debtor’s reading of
17 *That’s Entertainment* may be correct, but debtor fails to show how the case applies here. In
18 *That’s Entertainment*, the District Court decided the narrow issue of whether a trustee could
19 refuse to pay an accountant employed as an expert in an intellectual property action because
20 her special counsel and not the estate employed the accountant. The District Court
21 concluded, as debtor observes, the accounting firm did not require an employment order for
22 payment because the firm was only involved in “collateral litigation” which did not assume
23 a “central role in the bankruptcy case.” *Id.* at 230 (citations omitted).

24 Assuming, *arguendo*, *That’s Entertainment* offers a correct statement of the law, debtor
25 fails to show how or why it should apply here. Debtor has not offered any facts to show
26 what type of professionals will be employed as experts in this case let alone what kind of
27 advice they will offer, so it is impossible to tell whether the work is “central” to the
28

1 reorganization or not. Without facts, it is impossible to evaluate the factors set forth in the
2 moving papers.

3 The few facts one gathers from the circumstances of the motion itself suggest the
4 professionals will be more deeply involved in the reorganization than the accounting firm in
5 *That's Entertainment*. The professionals will be employed in connection with debtor's novel
6 plan of reorganization, not "collateral litigation" like the accounting firm. The nature of the
7 relief the plan seeks (that is, disaggregation and deregulation from existing California law)
8 suggests the experts would have advice beyond the expertise of debtor's bankruptcy
9 lawyers. Given the circumstances, it is not possible to conclude the professionals are
10 narrowly focused experts like the accounting firm in *That's Entertainment*.

11 *That's Entertainment* is distinguishable from PG&E in one other respect. The trustee
12 did not employ the professional in *That's Entertainment*. The accounting firm was retained
13 solely as an expert witness by the estate's special counsel, suggesting an unimportant role in
14 the main bankruptcy case. Here, by contrast, debtor seeks to employ the professionals as
15 experts in the main bankruptcy case. The professionals will be employed to assist in the
16 confirmation of debtor's innovative plan. The professionals' key role in the prosecution of
17 this case is substantially different than the discrete role of the accountants in *That's*
18 *Entertainment*.

19 **III. THE RETENTION MOTION IMPERMISSABLY SHIFTS THE AUTHORITY**
20 **TO EMPLOY PROFESSIONALS FROM THE BANKRUPTCY COURT TO**
21 **DEBTOR'S COUNSEL**

22 The Retention Motion proposes a subtle but important shift in authority over
23 employment matters from the Bankruptcy Court to debtor's counsel. The motion prays for
24 an order that would allow debtor to employ professionals as experts on the advice of
25 debtor's counsel. If granted, the Retention Motion would permit debtor's counsel to
26 determine whether a professional is an "expert" and thus would not require an employment
27 order. The proposal is not consistent with the Bankruptcy Code.

28 The Bankruptcy Code requires employment orders for "attorneys, accountants,
appraisers, auctioneers, or other professional persons." 11 U.S.C. § 327(a). The Code confers

1 authority to approve the employment of professionals on the Bankruptcy Court. 11 U.S.C. §
2 327(a) – (e) (the trustee may employ professionals “with the court’s approval.”). The
3 decision to permit a proposed employment is the Bankruptcy Court’s province.

4 The employment of professionals in bankruptcy cases is a central function of any
5 Bankruptcy Court. The Bankruptcy Court must determine whether professionals meet the
6 exacting standards of § 327(a). It has long been recognized that "professionals engaged in the
7 conduct of a bankruptcy case should be free of the slightest personal interest which might be
8 reflected in their decisions concerning matters of the debtor's estate or which might impair
9 the high degree of impartiality and detached judgment expected of them during the course
10 of administration." *In re Philadelphia Athletic Club, Inc.*, 20 B.R. 328, 334 (E.D. Pa. 1982)
11 (quoting 1 Collier Bankruptcy Manual § 101.13 (1981)).

12 The Retention Motion asks the Bankruptcy Court to delegate the function of
13 appointing professionals to debtor’s counsel. If granted, the Retention Motion would
14 authorize debtor’s counsel to determine whether a professional was necessary as an expert.
15 Retention Motion 2:6-10. Thus, if debtor’s counsel concluded a professional expert was
16 required, it would advise debtor to hire the professional and debtor would do so. If the
17 motion is granted, the Bankruptcy Court would have no role to play in a decision about
18 whether the professional’s work was “central” to the bankruptcy estate, the formulation
19 found in *That’s Entertainment*, and, therefore, whether an employment order would be
20 required.

21 **IV. DEBTOR SEEKS TO SEAL THE RECORD BUT HAS NOT MADE A MOTION** 22 **TO SEAL**

23 At the conclusion of its brief, debtor requests the Bankruptcy Court seal the record of
24 the identities of the professionals if it does not grant the relief requested. *See* page 6, fn.3.
25 Simply put, debtor has not filed a motion to seal the record (although it has filed at least one
26 such motion in the past) and the motion should be denied on this ground.

1 **CONCLUSION**

2 For the foregoing reasons, the United States Trustee urges the Bankruptcy Court deny
3 the Retention Motion.

4 Dated: May 24, 2002

5 Respectfully submitted,

6 Patricia A. Cutler
7 Assistant U.S. Trustee

8
9 By: _____
10 Stephen L. Johnson

11 Attorneys for U.S. Trustee
12 Linda Ekstrom Stanley
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28